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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANGELO DANIEL, Defendant and Appellant.	B275303 (Los Angeles County Super. Ct. No. TA133457)

APPEAL from an order of the Superior Court of Los Angeles County. Pat Connolly, Judge. Affirmed; remanded with directions.

Law Office of Corey Evan Parker and Corey Evan Parker for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, David F. Glassman, and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Angelo Daniel appeals from a judgment of conviction for murder and attempted murder, contending insufficient evidence supports the convictions, the trial court improperly admitted gang evidence, and the prosecutor committed misconduct. We disagree with each contention, and therefore affirm the judgment.

Daniel also contends the matter should be remanded for resentencing in light of a change in the law. We agree, and will remand the matter.

BACKGROUND

This case involves shootings at rival gang houses located approximately two miles apart on Kay and Bennett Streets in Compton, California.

Daniel lived at the Kay Street house and was an established member of the Santana Blocc Crips, a criminal street gang. Santana Blocc's primary activities were murder, robbery, assault, burglary, vehicle theft, drug sales, and firearm and drug possession. Daniel had "722" tattooed on his forearm, corresponding to "SBC" on a telephone keypad, and "Compton" on his back, and over the years had admitted his gang affiliation several times to police.

Gregory Aubrey, a member of the South Side Crips gang, a Santana Blocc rival, lived at the Bennett Street house, a South Side hangout. David Scott was a South Side "associate" and daily visitor at the house.

In September 2013, a South Side member traveled to Kay Street and shot Daniel's brother, and was himself killed by return gunfire.

In the months following, shootings between Santana Blocc and South Side occurred almost weekly. On May 5, 2014, two

South Side members were shot and killed by the Neighborhood Crips gang, a Santana Blocc ally. On May 17, South Side shot a non-gang member at Wilson Park, in Santana Blocc territory. On May 19, South Side committed a drive-by shooting of a known Santana Blocc hangout, killing a woman.

On the evening of May 21, 2014, Daniel sent a text message to his girlfriend stating, "If I die, I love you."

He then drove to Bennett Street, and from his moving car fired several shots from a .357 SIG semiautomatic handgun, wounding Aubrey and killing Scott.

Los Angeles County Sheriff's deputies recovered two expended Winchester .357-caliber SIG bullet casings on the street, and an eyewitness described the shooter's car as a silver sedan.

Deputies James Krase and Ryan Clarke were on patrol when they heard a radio call regarding the Bennett Street shooting. Recognizing the crime scene as a South Side house and aware of the recent shootings, Krase and Clarke drove to Kay Street, and waited.

Daniel arrived within minutes driving a tan Chevrolet Lumina. The deputies detained him and found gunshot residue on his hands and in his car, as well as two .357-caliber Winchester SIG shell casings in the car.

The eyewitness later stated Daniel's car resembled the shooter's car. She was not 100 percent sure, but stated there was "a high chance" it was the same car.

Microscopic analysis revealed that all four shell casings, two from the crime scene and two recovered from Daniel's car, were fired from the same gun.

Daniel was tried three times.

At the third trial, FBI Agent Michael Easter, an expert in historical cell site analysis, testified that approximately one hour before the Bennett Street shooting Daniel's cell phone had made a call that connected through a tower approximately 50 feet from the crime scene on Bennett Street. The phone placed a second call soon after the shooting from a location approximately halfway between Bennett and Kay Streets.

Sheriff's Detective Dan Morgan testified that Daniel's cell phone contained the following photographs: a hand flashing a Santana Blocc sign; a cartoon image of three men with the words "Here come them Santana Boys"; a wooden sign with the words "Santana Blocc"; Daniel with the number "722" in the corner; and Daniel's "Compton" back tattoo. All but the first photograph were taken or loaded onto the phone in 2013, i.e., within a year of the Bennett Street shooting.

Several sheriff's deputies testified that Daniel had been found in the company of gang members several times in 2008, 2013 and 2014, and always admitted he was a Santana Blocc member.

Sheriff's Sergeant George Bernal, a gang expert, testified that just after the September 2013 shooting at Daniel's house on Kay Street, where a South Side member was killed, Daniel sent a Facebook message stating, "they just took the body." In another message he stated that "the snots [South Side members] on the corner talkin about they gonna shoot up the house n shit," but he was "ready."

Daniel posted Facebook messages a week later stating, "snots shot up my party" and "bro got shot up but the snot that did it died in my driveway." In other messages Daniel referred to

himself as "a real tana," and stated, "I'm just at the crib solo lookin out," "sittin here barely sleepin patrolin," and "on[]alert."

Text messages Daniel sent and received a month after the September 13 Kay Street shooting discussed the ongoing rivalry with the "snots."

Two days after the May 5, 2014 shooting, where two South Side members were murdered by the Neighborhood Crips gang, Daniel sent and received text messages discussing the gang rivalry. One stated, "my sis said a car was following her yesterday trying to see where she was going so she didn't come to the house and called me and I got my tool belt and came outside to make sure she made it safe they been rolling thru it was goin down last night hard. . . ." Another referred to the sender as being on alert or on patrol.

On the day of the May 17 shooting in Wilson Park, Daniel received a text message stating, "I heard somebody from Tana got popped, so I was checking on u praying it wasnt my bd." Daniel responded, "not really but im alive right now r u ok?" The next day, more text messages were exchanged regarding the Wilson Park shooting, including a text to Daniel's cell phone stating, "I see why the snots mad one of them niggers was baby ke ke" (a South Side victim in the May 5 shooting).

The day after the May 19 shooting by South Side of a Santana Blocc hangout, Daniel sent a text message stating, "be careful them dudes killed my homie female couse last night on spring and palmer and shot up wilson park its gonna get ugly, so be careful stay from outside or around that area." Later, he texted, "not good my homegirl got killed last night." The next day Daniel texted, "idk where niggers at now its ghostown only a few

heads," referring to no other Santana Blocc members being around.

Sergeant Bernal opined from the text and Facebook messages, Daniel's tattoos, and his association with other Santana Blocc members and repeated admissions of membership that he was a Santana Blocc member.

Bernal testified that gang members are driven by a need for respect, freely admit their gang membership, and earn status in the gang by committing crimes. He stated that if one gang attacks another, the latter must retaliate to avoid losing status, commonly by committing drive-by shootings.

When posed a hypothetical based on the evidence in this case, Bernal opined the shooting was committed for the benefit of, at the direction of, or in association with Santana Blocc to elevate the gang's status, garner respect, instill fear in the rival gang and community, and deter community members from cooperating with law enforcement.

A jury found Daniel guilty of the first degree murder of Scott (Pen. Code, § 187)[1] and the willful, deliberate and premeditated attempted murder of Aubrey (§§ 664/187), and found true that he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and that a principal personally used and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (b)-(e)). It was also determined that Daniel had suffered a prior serious felony "strike" conviction. (§ 667, subd. (a)(1) & (b)-(i), § 1170.12, subds. (a)-(d).) The trial court sentenced him for the murder to

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[1] Undesignated statutory references will be to the Penal Code.

25 years to life plus 25 years to life for the weapon use enhancement and five years for the prior serious felony enhancement, and for the attempted murder to a consecutive sentence of life with a minimum parole eligibility of seven years, plus 25 years to life for the weapon use enhancement, for a total of 80 years to life. The court imposed sentences for the gang enhancements but ordered them stayed, and ordered the "strike" to be stricken for sentencing purposes.

After the trial court denied his motion for new trial, Daniel appealed.

DISCUSSION

A. Cumulative Gang Evidence

Daniel contends the trial court erred by admitting text and Facebook messages that were cumulative of other evidence, and therefore irrelevant, and further erred in admitting other gang evidence. He admits he did not object at trial to the latter evidence but argues any objection would have been futile, and in any case his contentions are preserved because admission of the objectionable evidence rendered the trial fundamentally unfair.

1. Text and Facebook Messages

Over the defense's objection the following text messages sent by Daniel were admitted: "My party, man. It went down bad at my house last Saturday. Snots shot up"; "I ain't in the city, but, yeah, I'm ready"; "I heard from sumbody, frm tana, got popped, so I'm checking on u"; "Car following my sister. I got my tool belt and came outside to make sure she made it safe. They been rollin thru. It was goin down last night hard"; "I'm on it. I'm the only one around here still, so gotta keep my eyes open." "Be careful. Them dudes killed my homie female cuz last night on Spring and Palmer and shot up Wilson Park. It's going to get

ugly, so be careful and stay from outside or around this area"; and "Not good. My homegirl got killed last night. Oh my God. What happened? Some street shit."

And Daniel received the following text messages: "I see why the snots mad, one of them - was baby Ke Ke"; "Them was snots that were killed on Santa Fe yesterday?"; and "yea. No hanging out for a minute and don't be driving around here for a few days. Just stay out of the way."

Daniel posted the following Facebook messages: "I'm ready"; "I'm a real tana"; and "Knoccin each other down, now shit happening to them. And it ain't so funny no more. Now they cryin peace and shit. But what they didn't know is once u got n-words in the dirt, ain't no peace. They never dealt with this before until now. We use to it, so we got thicker skin than them."

2. Gang Evidence

The trial court also admitted substantial evidence of Daniel's gang affiliation, all with no relevant objection from the defense. For example, four witnesses testified that sheriff's deputies filled out field identification cards over the years identifying Daniel as a Santana Blocc member. And Sergeant Bernal interpreted Daniel's messages and testified extensively about criminal activities of Santana Blocc members, the rivalry between Santana Blocc and South Side, and gang culture in general.

3. Legal Principles

A trial court must limit the introduction of evidence and argument to relevant and material matters. (§ 1044.) Relevant evidence is that which tends in reason to prove or disprove a disputed fact of consequence. (Evid. Code, § 210; *People v. Merriman* (2014) 60 Cal.4th 1, 78.) "[E]vidence of gang

membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Nevertheless, relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that would cause the jury to "prejudge" a person on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

In a gang-related case, gang evidence is admissible to prove enhancement allegations and to establish the motive for charged crimes. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) But given its inflammatory impact, "[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) "Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.)

"A trial court has considerable discretion to exclude even relevant evidence, however, if it determines the probative value

of the evidence is substantially outweighed by its possible prejudicial effects. [Citations.] A trial court's rulings in this regard will be upheld on appeal unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Merriman*, *supra*, 60 Cal.4th at p. 78.)

4. Analysis

Here, messages sent and received by Daniel demonstrated his affiliation with, commitment to, and active involvement in Santana Blocc, his disdain for South Side, and his awareness of its ongoing conflict with Santana Blocc and willingness to retaliate on his gang's behalf. He called South Side members "snots," proclaimed himself "a real tana" who was vigilant of and "ready" for their attacks, and checked up on a friend from Santana Blocc after a South Side attack. The messages tended in reason to explain his motivation and level of willingness to participate in the charged shooting.

Daniel argues the evidence was irrelevant because it pertained to undisputed matters. For example, he argues defense counsel conceded at trial that Daniel was a Santana Blocc member and knew about the feud between Santana Blocc and South Side, including the various shootings. But Daniel denied his *current* involvement with the gang.

A prosecutor must prove every element of the charged crime and any enhancement allegation beyond a reasonable doubt. Nothing limits the prosecution in this endeavor to only one piece of evidence on each fact of consequence. On the contrary, the prosecutor may chip away at reasonable doubt by offering corroboration on every material fact, limited only by the trial court's discretion to determine when the arcs of diminishing

returns and jury distraction intersect. Here, various lines of evidence addressed one of the crucial disputed issues in this case—Daniel's current involvement with Santana Blocc. None of the messages was significantly inflammatory, and in the aggregate they described for the jury the backdrop against which this otherwise inexplicable crime occurred.

Similarly, the historical evidence described and interpreted by Sergeant Bernal was directly relevant to the motive for the Bennett Street shooting. It showed that Santana Blocc members had committed crimes in the past, the gang was currently involved in a deadly feud with a rival gang, and rival gangs generally engage in violence. The evidence was not unduly prejudicial to Daniel, who has always admitted his Santana Blocc membership, now disputing only the currency of that membership. But none of the historical evidence touched on this issue or suggested Daniel had participated in his gang's earlier crimes.

Assuming the trial court committed some error in admitting Daniel's messages or other gang evidence, the error would have been harmless under any standard. Where there is " 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result,' " the error is prejudicial. (*People v. Mower* (2002) 28 Cal.4th 457, 484.) But here we have every reason to believe the jury would have reached the same result even absent any improperly admitted gang evidence. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required under the federal Constitution unless the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law

error requires reversal only if it is reasonably probable that the error had an effect on the verdict].)

B. Substantial Evidence

Daniel contends insufficient evidence supported the jury's conclusion that he was the shooter. This is so, he argues, because no one identified him as the shooter and no physical evidence linked him to the shooting except for two shell casings, which even the police expert admitted could not be positively tied to the crime scene, and gunshot residue, which could have been obtained from the back of a sheriff's patrol car.

"Substantial evidence is evidence which is ' "reasonable in nature, credible, and of solid value." ' [Citation.] 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Here, substantial evidence showed that Daniel was a member of Santana Blocc, then in the midst of a feud with South Side, and eager to retaliate against the rival gang for prior attacks. An eyewitness and his cell phone records placed his car and phone at the scene of the crime, and expended shell casings found at the crime scene and in his car, and gunshot residue on his hands and in his car, were consistent with his having been the shooter. This evidence supported his conviction.

Daniel argues the evidence was weak, because no one identified him as the shooter, the murder weapon was never

recovered, his car was not positively identified, the shell casings were of suspect provenance, and the sheriff's department acted inappropriately in detaining him and examining the evidence. He argues, for example, that the gunshot residue on his hands could have come from inside the patrol car in which he was detained. Our view of the evidence is to the contrary, but in any event we may not reweigh it, as our only province is to determine whether the jury could reasonably deduce from the evidence that Daniel was the shooter. We easily conclude it could.

C. Prosecutorial Misconduct

Daniel contends the prosecutor committed misconduct when she alluded to accomplices in her closing argument and made inflammatory remarks. We reject the contention.

During closing arguments, the prosecutor embellished on Daniel's text to his girlfriend, in which he had said only, "If I die, I love you." The prosecutor interpreted the message poetically, saying, "When I go and do this mission, when I go and put my life on the line for my gang that I love above all else, I want you to know I love you." The prosecutor told the jury, "He knows that when you go out to do a mission like this, when you go out in your car and your fellow gang members are with you, and you're armed, and you're ready to take another life, that you might end up paying with your own."

In other argument, the prosecutor said, "This case is about a world unlike any world that you and I want to be part of. It's a world where violence begets violence. It's about a world where a war continues to rage on. And it doesn't matter what side you're fighting for, because the soldiers in this war, they won't stop to ask you what side you're fighting for, and they won't stop to see what colors you're wearing." She described Daniel as a "soldier"

who was "lost," and stated he "loved that gang more than he loved anything else."

Finally, the prosecutor made several references to Daniel's accomplices, even though the evidence that he acted in concert with anyone else—for example evidence that the gun was never found and that a second car was seen at both the crime and arrest locations—was sparse. Daniel argues the liberal interpretation of his text message and repeated references to his being a soldier engaged in a love affair with his gang could only have inflamed and prejudiced the jury, as there was no evidence that he acted on orders from the gang or had any prior gang-related conviction. He also argues the reference to accomplices prejudiced him, although he fails to explain how.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "When a claim of misconduct is based on the prosecutor's comments before the jury . . . , ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " [Citations.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.)

Here, Daniel made no contemporaneous objection to any of the statements to which he now objects. Because no basis exists in the record to conclude an objection would have been futile, the issue is forfeited.

In any event, Daniel's objections are without merit. "Although it is misconduct to misstate facts, the prosecutor 'enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom.' " (*People v. Collins* (2010) 49 Cal.4th 175, 230.) Here, the prosecutor's poetic characterization of Daniel's last message to his girlfriend, and her references to his being a Santana Blocc soldier and loving the gang, did not materially misrepresent the evidence. Although it is true there was no direct evidence that Daniel had any accomplice in the Bennett Street shooting, any misstatement to that effect was innocuous, and could easily have been corrected by the court upon timely objection. And as the jury was instructed to determine the facts from the evidence and not from the arguments of counsel, no prejudice likely resulted.

D. Senate Bills Nos. 620 and 1393 Require Remand

Daniel contends the case should be remanded for resentencing in light of recently enacted Senate Bills Nos. 620 and 1393. Respondent concedes the point, and we agree.

The jury found that Daniel personally and intentionally used and discharged a firearm, causing great bodily injury and death. Lacking at the time authority to strike or dismiss gun enhancements under section 12022.53 (see, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363), the trial court imposed two 25-years-to-life gun enhancements pursuant to subdivisions (d) and (e)(1) of section 12022.53. The court further enhanced

Daniel's sentence due to his recidivism pursuant to section 667, subdivision (a)(1).)

Before Daniel had exhausted his opportunities to challenge the trial court's judgment in reviewing courts, the Legislature amended section 12022.53 to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 682.) The amendment went into effect on January 1, 2018. (See Cal. Const., art. IV, § 8, subd. (c).) Similarly, on September 30, 2018, the Legislature amended section 1385 to remove a provision preventing a judge from striking prior serious felony convictions for purposes of sentence enhancement under section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1 (Sen. Bill No. 1393), effective Jan. 1, 2019.)

An amendment to the Penal Code will not generally apply retroactively (see § 3), but an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745.) Reduction of a punishment indicates the Legislature has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act," and "should apply to every case to which it constitutionally could apply." (*Ibid*.)

The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant's punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

Although the trial court here had no discretion to strike the enhancements at the time of sentencing, the record is silent as to

whether the court might have been open to doing so. Therefore, the matter must be remanded to provide the court with the opportunity to exercise its discretion.

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall determine whether to strike any enhancements imposed under sections 12022.53 or 667, subdivision (a)(1). If the court strikes any such enhancements, it shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.